IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1418

THE NEW YORK CENTRAL RAILROAD COMPANY, NEW JERSEY JUNCTION RAILROAD COMPANY, ERIE RAILROAD COMPANY,
Petitioners,

v.

HENRY K. NORTON, Successor Trustee of New York, Susquehanna and Western Railroad Company,
Respondent.

No. 1419

THE NEW YORK CENTRAL RAILROAD COMPANY, NEW JERSEY JUNCTION RAILROAD COMPANY, ERIE RAILROAD COMPANY,
Petitioners,

v.

NEW YORK LIFE INSURANCE COMPANY, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The New York Central Railroad Company and New Jersey Junction Railroad Company, petitioners, respectfully pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled causes.

Opinion Below

The opinion of the Circuit Court, reported in F. 2d , appears in the printed record at pages 116-124 of Central's Appendix, and the order amending the opinion appears at page 135. The opinion of the Circuit Court in the Trustee's case was filed December 19, 1946 (C. App., p. 116). The petition for rehearing was filed January 13, 1947 (C. App., p. 127). The opinion in the Insurance Companies' case was filed January 16, 1947 (C. App., p. 124). The petition for rehearing in the Trustee's case was docketed in the Insurance Companies' case also. The orders for judgments in both cases were entered January 16, 1947 (C. App., pp. 125, 126). The petitions for rehearing were denied March 7, 1947 (C. App., pp. 135, 136). This petition is filed within three months from that date.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. 347).

Statutes Involved

Section 70(b) and Section 77 of the Bankruptcy Act (11 U. S. C. 110, 205) and Section 1(18) of Part I of the Interstate Commerce Act (49 U. S. C. 1), the pertinent provisions of which are set forth in the appendix to this petition.

Statement of the Matter

The New York, Susquehanna and Western Railroad Company (herein called the Susquehanna Company) is the

Debtor in proceedings for reorganization under Section 77 of the Bankruptcy Act, pending in the United States District Court for the District of New Jersey.

During such proceedings the Trustee of the Debtor acquired the section of railroad known as the Edgewater Section, located in the vicinity of Edgewater, New Jersey, by purchase from the Erie Terminals Railroad Company (herein called the Terminals Company), in connection with the settlement of controversies between him and the Trustees of the Erie Railroad Company, which company was also in process of reorganization under Section 77 of the Bankruptcy Act (Pt. II, pp. 226, 271).*

Pursuant to such settlement the Edgewater Section was conveyed by the Terminals Company to the Susquehanna Trustee, and at the same time all agreements relating to the property were assigned to him by instrument under which he assumed and agreed to be bound by and to perform, fulfill and carry out all liability and obligation of the Terminals Company under said agreements, such assumption and agreement to be binding upon his successors and assigns (Pt. II, pp. 450, 463, 469, 471).

Shortly thereafter, the Susquehanna Trustee served notice upon the New Jersey Junction Railroad Company and its lessee, The New York Central Railroad Company, the petitioners herein (called the Central and Junction Companies), purporting to reject or disaffirm certain agreements relating to establishment and operation of the Edgewater Section as a joint facility (Pt. II, p. 483). In issuing such notice the Trustee apparently assumed that he had the power to do so under Section 70(b) of the Bankruptcy Act, or as a trustee vested with the powers of an equity receiver.

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* The references to the Trustee's appendix are made thus: (Pt. I, p.) and (Pt. II, p.); and references to the Central's appendix are made thus: (C. App., p.); and references to the Erie's appendix are made thus: (E. App., p.).

The Central and Junction Companies thereupon petitioned the District Court having charge of the Susquehanna reorganization to set aside the notice of rejection and enforce their rights under said agreements in the Edgewater Section (Pt. I, p. 5a).

The Erie Railroad Company also petitioned the District Court to set aside the notice of rejection and enforce the assumption agreement made by the Trustee (E. App., p. 1a).

After trial of the issues, the District Court set aside the Trustee's notice of rejection and instructed him to take no action in furtherance of said notice (Pt. I, p. 475a).

The Trustee's acquisition of the Edgewater Section had been approved and authorized by the Interstate Commerce Commission pursuant to Section 5 (2) of the Interstate Commerce Act (249 I. C. C. 777), wherein the assumption of obligations by the Trustee under the agreements here in question was among the terms and conditions found by the Commission to be just and reasonable in granting its approval of such acquisition (Pt. II, pp. 355, 357).

Similarly, in each instance, the District Courts which respectively authorized the Susquehanna Trustee and the Erie Trustees to consummate the settlement had before them and approved the terms of such settlement which provided that the Susquehanna Trustee would "Assume, such assumption to be binding upon his successors and assigns, the duties and liabilities of Erie Terminals Railroad Company under existing contracts and leases in connection with said Edgewater Section" (Pt. II, pp. 236, 241, 276, 285).

And the Board of Public Utility Commissioners of New Jersey authorized the Terminals Company to convey the Edgewater Section to the Susquehanna Trustee upon like terms (Pt. II, pp. 409, 412).

Previously in a proceeding to determine the extent and priority of the liens of the various mortgages of the Susquehanna Company, it had been determined that none of such mortgages was a lien upon any property owned or held by the Terminals Company, which included among other property its interest in the Edgewater Section. *In re New York, S. & W. R. Co.*, 109 F. 2d 988, 995, certiorari denied 310 U. S. 633 (Pt. II, pp. 568, 587, 594).

The Edgewater Section is part of a joint railroad facility which was established to avoid the duplication of railroad facilities. The basic agreement of 1904, providing for this joint facility, was perpetual in duration and contained no provision for termination or forfeiture by reason of default or otherwise. The Susquehanna Company was not a party to that agreement (Pt. II, p. 86).

Under that agreement the parties granted to each other the right to use and enjoy their respective sections of the joint facility for the transportation of freight and passengers (Pt. II, p. 88). The trains, cars and engines of the parties were to have equal rights and privileges, and the operations were to be subject to rules and regulations to be mutually agreed upon (Pt. II, pp. 88, 91). Each party had the right to construct and use switches, sidings, extensions and connections along either section, and in case either party failed to complete its section the other party was authorized to construct and have exclusive use thereof (Pt. II, pp. 90, 91). Each party was required to bear one-half of an interest charge on the cost of the other's section and to share the cost of maintenance and taxes on a "user" basis (Pt. II, pp. 89, 91).

During the pendency of these proceedings, the Insurance Companies, respondents herein, requested the Commission to include in the plan of reorganization a provision for rejection of the agreements (C. App., p. 76a). Division 4 of the Commission denied such request, finding "that the

plan with the inclusion therein of the requested disaffirmance provision would not be compatible with the public interest" (257 I. C. C. 593, 668) (C. App., p. 78a). This was affirmed later by the full Commission which determined, both as to the question of public interest and the circumstances and conditions under which the acquisition of the Edgewater Section was authorized and consummated, "that the requested provision conditionally rejecting the basic contracts should not be approved by us as part of the plan" (261 I. C. C. 101, 117) (C. App., p. 87a).

The plan of reorganization has been certified by the Commission to the District Court, and is awaiting hearing in that Court on objections to the plan filed by the Trustee, the Insurance Companies, and others.

Questions Presented

The general question presented is whether the Trustee had any authority in law to issue the purported notice of rejection as to the basic 1904 and 1911 agreements. This question in turn is dependent upon the answers to the following specific questions:

May the Trustee, in connection with his acquisition of a section of railroad, take an assignment of outstanding agreements relating thereto which had been made by his grantor, and, notwithstanding his affirmative covenant to assume the obligations of such agreements, thereupon under the guise of disaffirmance repudiate them?

Did the agreements of 1904 and 1911 constitute executed grants vesting in the petitioners such property rights in the Edgewater Section as to render the agreement not subject to disaffirmance in connection with the reorganization of the Debtor?

May the Trustee by disaffirmance modify or annul the terms and conditions imposed by the District Court and the Interstate Commerce Commission in authorizing him to acquire the Edgewater Section?

Was the action of the District Court in setting aside the notice of rejection proper in light of the determination by the Commission in the plan proceeding that rejection of the agreements would not be compatible with the public interest?

Position of the Petitioners

The Circuit Court wrongfully held that the action of the District Court was premature in setting aside the Trustee's notice of rejection. If there was any element of prematurity in the case, it involved the action of the Trustee in issuing the notice.

Not only did the Trustee lack authority to issue such notice, since the only course open to him was through proceedings before the Commission, but he had no legal right to disaffirm the agreements.

The bankruptcy law does not confer upon a Trustee any right to take an assignment of agreements and thereupon disaffirm them. Here the Trustee expressly agreed to bind himself and his successors and assigns to the obligations of his assignor under the agreements.

This does not present a question of disaffirmance but one of repudiation. The Trustee acquired the Edgewater Section and assumed the agreements with the approval of his custodial Court. He should be held to his obligations.

The Trustee obtained authority from the Commission to purchase the Edgewater Section upon terms and conditions which required his assumption of obligations under the agreements. He should not be permitted in a collateral

proceeding to modify such terms and conditions by disaffirmance.

The petitioners were vested with property rights in the Edgewater Section under the agreements. These rights had been granted to them, not by the Susquehanna Company, but by others in the creation of the joint railroad facility. The grant was made in perpetuity, without termination or forfeiture provisions, and provided for use and enjoyment of the property on an equal basis, and even exclusive use if occasion therefor should arise under the terms of the grant.

The bankruptcy law does not provide the means whereby a Trustee may acquire property and extinguish rights of this nature which had been granted to others in the joint use of the property. Nor would that be permissible under the bankruptcy clause of the Constitution.

The Commission has determined that this joint railroad facility should be maintained as established under the agreements, both as regards the public interest and the circumstances under which the Trustee acquired the Edgewater Section. Such determination should conclude the matter; in any event, it may not be attacked collaterally.

Reasons for Granting the Writs

The decision of the Circuit Court improperly applies, and conflicts with the principles laid down by this Court in *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, and *Smith* v. *Hoboken R. Co.*, 328 U. S. 123.

The Circuit Court has decided important questions which should be reviewed by this Court, with respect to the application of Section 77 of the Bankruptcy Act to rights of others in property or agreements which the Trustee has acquired by assignment or purchase.

Important questions are presented which should be reviewed by this Court, with respect to the administration of the Bankruptcy Act and the Interstate Commerce Act, and the relative powers and duties of the Trustee, the District Court and the Interstate Commerce Commission.

WHEREFORE, the petitioners pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit in these cases.

Respectfully submitted,

JACOB ARONSON,
JOHN A. HARTPENCE,
SAMUEL H. HELLENBRAND,
Attorneys for Petitioners, The New York Central Railroad Company and New Jersey Junction Railroad Company.

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NEW YORK LIFE INSURANCE COMPANY, THE MUTUAL BENEFIT LIFE INSURANCE COMPANY and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Preliminary Statement

We refer to the foregoing petition for a citation of the opinion below, statement of grounds of jurisdiction, citation of statutes involved, and a summary statement of the facts of the case.

Argument

The Circuit Court committed fundamental errors in its decision, not alone in its view that it was unnecessary to pass upon the legal authority of the Trustee to disaffirm the agreements, but in holding that the District Court acted prematurely in setting aside the Trustee's notice of rejection.

The notice did not reflect merely "the trustee's determination to disaffirm the agreements" in advance of proceedings before the Commission (C. App., p. 135). The Trustee issued the notice to effectuate disaffirmance with all its legal consequences. If any question of prematurity is presented in this case, it was not the action of the District Court but that of the Trustee which was premature. His action was not merely premature—he had no legal right to disaffirm the agreements.

The Circuit Court assumed that the District Court had proceeded to a hearing "as if under Section 77(o)" (C. App., pp. 120, 135), which requires action by the Commission. That section, however, deals with abandonment of lines of railroad of the "debtor," and not lines of others. The proceeding in the District Court was not brought under Section 77(o) of the Bankruptcy Act, nor was it considered or dealt with as such a proceeding. The Trustee had issued notice of rejection on his own initiative, without instructions of his custodial Court, seeking by disaffirmance to eject petitioners from the Edgewater Section.

The issues presented to the District Court involved primarily the question whether a right of disaffirmance existed at all—not simply a question whether the Trustee should be permitted to exercise a right of disaffirmance. The petitioners contended that the agreements were not subject to disaffirmance, because (a) the Trustee by his own agreement had assumed the obligations of his as-

signor under agreements relating to the Edgewater Section, as binding upon him and his successors and assigns, pursuant to terms of settlement approved by his custodial Court, (b) the terms and conditions upon which the Trustee was authorized by the Commission to purchase the Edgewater Section required him to assume and bind his successors and assigns to the obligations of his grantor under agreement relating to the property, and (c) the petitioners were vested with property rights in the Edgewater Section which the Trustee's predecessor in title had granted to them under the basic agreements. These were legal questions requiring judicial determination, and the District Court properly proceeded within its jurisdiction to hear and decide them.

Furthermore, the matter of disaffirmance has been before the Commission in the plan proceeding, and not only Division 4 but the full Commission have specifically declined to include in the plan a provision for rejection of the agreements, holding that disaffirmance of the agreements would neither be compatible with the public interest nor consistent with the circumstances and conditions under which the Trustee was authorized to acquire the Edgewater Section (C. App., pp. 78a, 87a).

The Decision of the Circuit Court Conflicts With, and Misapplies the Decisions of This Court in the *Tex-Mex* and *Hoboken Railroad* Cases

In both these cases, *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, and *Smith* v. *Hoboken R. Co.*, 328 U. S. 123, a legal right of termination was expressly reserved under the instruments in question, to the grantor of trackage rights in one instance, and to the lessor of railroad property in the other, and this Court held that such right should not be exercised or enforced prior to determination by the Commission in appropriate proceedings as to the proper

treatment of the trackage agreement or lease in the reorganization of the grantee or lessee.

The Circuit Court seeks to apply these decisions in support of its ruling that the action of the District Court was premature in setting aside the Trustee's notice of rejection prior to determination by the Commission of the question whether the trackage or railroad of petitioners may be abandoned (C. App., pp. 121, 122, 123). But the proper application of these decisions would require that the Trustee's notice be set aside, not that the District Court's order be vacated. The effect of the Circuit Court decision is to leave open and outstanding a notice of rejection, which, according to the decisions of this Court, the Trustee had no authority to issue. The decision of the Circuit Court therefore conflicts with the principles stated by this Court in the cases mentioned. It was the action of the Trustee, in summarily issuing notice purporting to disaffirm the agreements, that was inconsistent with the procedure required under the decisions of this Court.

The Trustee had a legal duty to maintain the status quo of the agreements pending decision by the Commission.

Furthermore, this case has an additional feature which was not present in the *Tex-Mex* and *Hoboken Railroad* cases. Here the matter of rejection of the agreements was submitted to the Commission, and the Commission has rendered its decision refusing to make provision for such rejection in the plan of reorganization. The reports and orders of the Commission were before the District Court in the hearing of this case (C. App., pp. 71a, 79a). The Circuit Court states in its opinion that there was no certification to the District Court by the Commission "of any matter respecting the plan of reorganization including the trackage rights" (C. App., p. 121). This would appear to be merely a play upon words. The refusal of the Commission to provide for rejection of the agreements as part of the plan accomplished the same result.

In the light of the decision of the Commission the order of the District Court setting aside the Trustee's notice of rejection was proper.

The Trustee Had No Legal Right to Disaffirm Agreements Assumed by Him as a Contracting Party

The Bankruptcy Act does not confer upon a Trustee any power, nor would such power be permissible within constitutional limitations, to disaffirm agreements which he has acquired through assignment from others. Nor does the Bankruptcy Act provide the means whereby a Trustee may acquire property and thereupon extinguish rights of others in the use of such property.

Here the Trustee acquired the Edgewater Section from the Terminals Company, a solvent company, together with its interest in agreements relating to the property, and at the same time the Trustee expressly assumed and bound his successors and assigns to the obligations of the Terminals Company under such agreements (Pt. II, p. 471).

The Trustee's custodial Court had approved terms of settlement, under which the Trustee acquired the Edgewater Section, providing that he would "Assume, such assumption to be binding upon his successors and assigns, the duties and liabilities of Erie Terminals Railroad Company under existing contracts and leases in connection with said Edgewater Section" (Pt. II, pp. 276, 285).

The District Court in Ohio, having charge of the Erie reorganization, had authorized the Erie Trustees to consummate settlement on the same basis (Pt. II, pp. 236, 241).

The petitioners, Central and Junction Companies, derived their rights in the joint use of the Edgewater Section from the Edgewater Company, a corporate predecessor of the Terminals Company, under the basic agreement of 1904,

which was modified in some respects by the agreement of 1911 (Pt. II, pp. 86, 116).

It was represented in the proceedings before both said Courts that the rights of petitioners under the agreements would not be disturbed in any way as a result of the settlement (Pt. II, pp. 254-255, 289, 291).

Further, as between Counsel for the Trustee and Counsel for the Insurance Companies (the latter being also Special Counsel for the Trustee herein), it was distinctly understood that the provision for binding successors and assigns would include the reorganized Susquehanna Company (Pt. I, pp. 290a, 291a).

In view of all these circumstances, under which the Trustee acquired agreements and assumed obligations thereunder, it is apparent that the question presented here is not one of disaffirmance but of repudiation. The exercise of powers conferred upon the Trustee by the Bankruptcy Act are "subject to the control of the judge" (Section 77(c)(2)). The Trustee should be required to perform obligations which he has assumed as a contracting party with the approval of his custodial Court.

Not for that reason alone, which indeed should be sufficient to hold the Trustee to his obligations, but, apart from any question of property rights, the agreements granted to petitioners such rights in the Edgewater Section as may properly be enforced by specific performance. *Union Pacific Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 600.

The Circuit Court held that the District Court did not err in finding "that the trustee assumed the 1904 and 1911 contracts when he acquired title to the Edgewater Section" (C. App., p. 119). Thus, within the framework of its own decision, the Circuit Court should have affirmed the order of the District Court setting aside the Trustee's notice of rejection.

The Attempt by the Trustee to Disaffirm the Agreements Is a Collateral Attack Upon the Order of the Commission in the Acquisition Proceeding

The Trustee is bound by the terms and conditions upon which the Commission authorized him to acquire the Edgewater Section. Among such terms and conditions, proposed by the Trustee himself and incorporated in the report of the Commission, was the provision that "the applicant and its successor and assigns will assume all liability and obligation of every nature which now exists under and by virtue of prior contracts, agreements, leases, and licenses which now exist upon the property, and agree to perform, fulfill, and carry out all the liability and obligation of the predecessor company party to the contracts" (Pt. II, p. 355).

In his application to the Commission under Section 5(2) of the Interstate Commerce Act for permission to acquire the Edgewater Section, the Trustee referred particularly to the agreements involved in this case as among those to be assigned to him, under which he would assume the duties and liabilities of the Terminals Company as binding upon his successors and assigns (Pt. II, pp. 305-7).

At the hearing in the acquisition proceeding the present Trustee (then Executive Officer for the Trustee) testified that there was no intention to alter in any way the rights of petitioners and that their rights should remain intact (Pt. II, pp. 366, 369).

It is clear that the Trustee's acquisition of the Edgewater Section was approved by the Commission upon the basis of his application, his unequivocal testimony, and his agreement to assume the obligations of the Terminals Company under the joint railroad agreements. Such assumption was therefore one of the "terms and conditions" which the Commission, as a condition precedent to granting its

approval of the acquisition, was required by Section 5(2) of the Interstate Commerce Act to find, and which it did find, to be just and reasonable.

Having sought and obtained the approval of the Commission, the Trustee should not now be permitted to attack collaterally the order granting such approval, and by the process of disaffirmance to nullify the terms and conditions upon which the order was granted.

The acquisition order may be reviewed only through the procedure provided in the Urgent Deficiencies Act and the Judicial Code. 28 U. S. C. A. Sec. 41(28), 47. It is not subject to collateral attack. *Interstate Commerce Commission* v. *Consolidated Freightways*, 41 F. Supp. 651, 655, D. C. N. D.; *Venner* v. *Michigan Central R. Co.*, 271 U. S. 127, 130. *Cf. Board of Public Utility Commissioners* v. *United States*, 21 F. Supp. 543, 547; *Powell* v. *United States*, 300 U. S. 276, 288. See also *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561.

The Petitioners Are Vested With Property Rights in the Edgewater Section which Cannot be Disaffirmed

This is not a case of simple trackage rights. The joint railroad facility at Edgewater is in every essential respect a joint railroad, created under the basic agreement of 1904 for the joint use of the parties, in place of separately projected railroads, and vesting the parties with equal rights in the use of their respective sections of the railroad. road.

The Bankruptcy Act provides that the rejection of a lease by the Trustee of the lessor "shall not deprive the lessee of his estate." Section 70(b). True, there was not here a lease, but the basic agreement created at least equal if not greater rights. The grant of 1904 was perpetual in duration and neither terminable nor subject to forfeiture.

It constituted an executed grant of permanent rights in the use of the property.

The Edgewater and Shore Line Companies, original parties to the 1904 agreement, granted to each other equal rights, not of trackage alone, but of the use and enjoyment of their respective sections of the joint railroad, together with the right to construct and use tracks on either section, and if there should be occasion therefor even to construct and have exclusive use of the section of the other party (Pt. II, pp. 88-91).

The right to build a railroad upon the located route of another company with its consent was authorized under the laws of New Jersey and recognized as a franchise right. New Jersey Statutes, Title 48:12-36; *Greenville & Hudson Ry. Co.* v. *Grey, Atty-Gen.*, 62 N. J. Eq. 768, 773. Even the abandonment of the Edgewater Section by the Trustee would not preclude petitioners from using the property for their railroad purposes.

Nor was the Susquehanna Company a party to the 1904 agreement. The rights of petitioners thereunder were granted to them by the Edgewater Company, corporate predecessor of the Terminals Company. The Trustee acquired the Edgewater Section from the Terminals Company, and holds title in his own right as a grantee. We are not dealing here with property which came into the hands of the Trustee from the Debtor. That the Edgewater Section was not property of the Debtor is indicated in the decision of the lien controversy, that none of the Susquehanna mortgages was a lien upon the Edgewater Section. *In re New York, S. & W. R. Co.*, 109 F. 2d 988, 995, certiorari denied 310 U. S. 633.

The bankruptcy clause of the Constitution was never intended to impair the security of vested rights in property to serve the interest of creditors of an insolvent estate. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555,

589. Much less is there any authority for a Trustee to acquire property and divest others of their rights in the property.

Conclusion

The issues presented by these cases are of great importance. This joint railroad facility has been in existence for almost 40 years. It was established to avoid the duplication of railroad facilities, and is consistent with the national transportation policy later declared by Congress in the Interstate Commerce Act. The public interest requires the continuance of benefits long enjoyed by the industries located in this area. The District Court and the Commission have both held that disaffirmance of the basic agreements would not be compatible with the public interest.

The issues also present a further important question as regards the integrity of action taken by the Trustee and agreements made by him in connection with his acquisition of an interest in this joint railroad facility. The process of bankruptcy does not lend itself to be used as a device to destroy rights in the manner here sought to be accomplished by the Trustee.

Without undertaking at this time to present an adequate argument on the merits of the questions presented, we submit that the petition for writs of certiorari should be granted in order that the Court may review the decision of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

JACOB ARONSON,
JOHN A. HARTPENCE,
SAMUEL H. HELLENBRAND,
Attorneys for Petitioners, The New York Central Railroad Company and New Jersey Junction Railroad Company.

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Respondents.

MEMORANDUM OF ERIE RAILROAD COMPANY IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI OF THE NEW YORK CENTRAL RAILROAD COMPANY AND NEW JERSEY JUNCTION RAILROAD COMPANY TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the Erie Railroad Company, one of the parties in the above entitled causes, and joins in the petition for writs of certiorari in the above entitled causes, and in

support thereof respectfully refers to, concurs in and adopts the petition for writs of certiorari and brief in support thereof, of The New York Central Railroad Company and New Jersey Junction Railroad Company, Petitioners.

Respectfully submitted,

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Attorney for Erie Railroad Company,
1180 Raymond Boulevard,
Newark 2, New Jersey.

M. C. SMITH, JR.,
Of Counsel.

APPENDIX.

The pertinent provisions of the statutes involved read as follows:

BANKRUPTCY ACT, Sec. 70(b); 52 Stat. 880; 11 U. S. C. Sec. 110(b).—"Within sixty days after the adjudication, the trustee shall assume or reject any executory contracts, including unexpired leases of real property: *Provided, however,* That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee: *Provided, however,* That the court may for cause shown extend or reduce such period of time. Unless a lease of real property shall expressly otherwise provide, a rejection of such lease or of any covenant therein by the trustee of the lessor shall not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns such contract or lease to a third person, shall not be liable for breaches occurring after such assignment."

BANKRUPTCY ACT, Sec. 77(b); 49 Stat. 911, 912, 11 U. S. C. Sec. 205(b).—"A plan of reorganization within the meaning of this section . . . may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section. . . .

"The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted."

BANKRUPTCY ACT, Sec. 77(c)(2); 49 Stat. 914; 11 U. S. C. Sec. 205(c)(2).—". . . The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. . . ."

BANKRUPTCY ACT, Sec. 77(o); 49 Stat. 923; 11 U. S. C. Sec. 205(o).—"The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the

public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage."

INTERSTATE COMMERCE ACT, Sec. 1(18); 41 Stat. 477, 49 Stat. 543, 54 Stat. 902; 49 U. S. C. Sec. 1(18).—"After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or ex-

tended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."